



# Commonwealth of Massachusetts

## State Ethics Commission

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### CONFLICT OF INTEREST OPINION EC-COI-94-9\*

#### FACTS:

You are an elected, uncompensated member of the Hampden-Wilbraham Regional School Committee (“Committee”) as a result of Wilbraham town elections. The Committee consists of seven members, five members elected by Wilbraham voters and two members elected by Hampden voters.

You are also an attorney in private practice. You wish to represent private parties, for compensation, before boards and municipal agencies in Wilbraham. The Wilbraham Board of Selectmen is willing to designate members of the Committee as “special municipal employees”, but the Hampden Board of Selectmen is not.

#### QUESTION:

If the Wilbraham Board of Selectmen alone designates you a “special municipal employee”, may you represent private parties, for compensation, before Wilbraham boards and municipal agencies?

#### ANSWER:

Yes, provided that the representation does not involve a matter in which Hampden or the Committee is a party or has a direct and substantial interest.

#### DISCUSSION:

“Municipal employee” is defined in G.L. c. 268A, §1(g) as “a person performing services for or holding an office, position, employment or membership in a *municipal agency* whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis...” (emphasis supplied). For purposes of G.L. c. 268A, “municipal agency” is defined as “any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal *or other instrumentality thereof or thereunder.*” G.L. c. 268A, §1(f)(emphasis supplied).

In *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428 (1992), the Appeals Court held that a regional school committee was an “instrumentality” of its member municipalities, in that it is a “means” by which the municipalities fulfill “their statutory obligation to provide education”. Since *McMann*, it is now clear that a regional school board, like the Committee, is a municipal agency of each of its member towns, here Hampden and Wilbraham. See, e.g., *EC-COI-92-26*; *92-27*; *92-40*. Thus, by virtue of your membership on the Committee, you are, for purposes of the conflict law, a municipal employee of Hampden and Wilbraham. See *id.*

Section 17(a) of G.L. c. 268A provides that no municipal employee shall, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation<sup>1/</sup> from anyone other than the city or town or municipal agency in relation to any particular matter<sup>2/</sup> in which the same city or town is a party or has a direct and substantial interest.

Section 17(c) of c. 268A provides that no municipal employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the city or town or municipal agency in prosecuting any claim against the same city or town, or as agent or attorney for anyone in connection with any particular matter in which the same city or town is a party or has a direct and substantial interest.

These sections of c. 268A, “are designed to prohibit divided loyalties”, *EC-COI-92-10*, and reflect “the old maxim that a §man cannot serve two masters”. *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (Liacos, J. dissenting); *EC-COI-90-15* (“The purpose of §17, prohibiting assistance to others, is §the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to also be a private employee is a contradiction in terms: it suggests that he is serving two masters.” [quoting *Buss, The Massachusetts Conflict of Interest Statute: An Analysis*, 45 *Boston Univ. Law Rev.* 299, 322 (1965)]). Section 17 is applicable whenever an economic benefit is received by the employee for services rendered or to be rendered to a private party “when his sole loyalty should be to the public interest”. *Id.* Thus, we have consistently interpreted §17 to prohibit municipal employees from receiving compensation or from representing private parties in matters in which their own town is a party or has a direct and substantial interest, whether or not the interests of the town and the private party are adverse to one another. See, e.g., *EC-COI-88-7* (an assistant city solicitor may not represent criminal defendant in a motion to suppress hearing for compensation because of city’s direct and substantial interest in the proceeding); *88-1* (part-time city solicitor may not represent private applicant for zoning variance); *84-117* (selectman may not act as legal representative of trust before municipal board); *84-97* (attorney for city public housing tenants’ council may not represent private clients in proceeding before municipal board or in lawsuit challenging board’s regulations); see also *Town of Edgartown v. State Ethics Commission*, 391 Mass. 83, 90 (1984) (§17 precludes Edgartown attorney from “acting as attorney for other parties, for compensation, relative to a particular matter in which Edgartown is interested,” whether or not parties’ interests are adverse).

A “special municipal employee” is a municipal employee “whose position has been expressly classified ... as that of a special employee” by the board of selectmen, board of aldermen, or city council, whichever is applicable, using “standards reasonably related to the stated purposes and terms” of the conflict law. G.L. c. 268A, §1(n). As we have recently observed, the special municipal employee designation “is intended to be reserved for those who in fact have limited contact with their level of government.” *EC-COI-93-18* quoting *Buss, supra*, at 314. Among the considerations relevant to the special employee determination are whether or not the municipal employee receives compensation and/or is permitted personal or private work during normal working hours. *Braucher, Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 12 (1964). Special designation is given to ensure that the restrictions contained in the conflict law with regard to regular (typically full-time, compensated) employees will not disable the government from securing the services of capable people for intermittent, often uncompensated work. See *Final Report of the Special Commission*, House Doc. No. 3650 (1962), at p. 12.

A special municipal employee is subject to §17(a) and (c) “only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been the subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves no more than sixty days during any period of three hundred and sixty-five consecutive days.” Thus, if you were designated as a special municipal employee in your Committee position, §17 would not prohibit you from representing private parties before municipal boards or agencies with regard to matters others than those in which you participated, or with which the Committee is concerned.<sup>3/</sup>

Here, the proposed private work will involve representation of private parties before Wilbraham municipal boards and agencies other than the Committee. As a regular employee of that town by virtue or your membership on the Committee, §17 would prohibit such representation because you would be “receiving . . . compensation from [some]one other than [Wilbraham] or [the Hampden-Wilbraham Regional School Committee] in relation to [a] particular matter in which the same . . . town [Wilbraham] is a party or has a direct and substantial interest.” You tell us, however, that the Wilbraham Board of Selectmen is willing to grant you and the other Committee members special municipal employee status in Wilbraham. That is, the Wilbraham Selectmen have indicated their willingness to invoke the mechanism provided by c. 268A, §1(n), that will secure your uncompensated service on the Committee without overly burdening your ability to practice law in that (your own) community. If you are so designated, we conclude that §17 should apply less restrictively to you with regard to your representation of private parties in Wilbraham.

While the question presented in this case has never been squarely addressed by this Commission, our prior precedent would appear to suggest that in order for §17 to apply less restrictively to you in Wilbraham, each of the Committee’s member towns would have to designate you as a special municipal employee. See, e.g., *EC-COI-92-27*; *92-40*. (That is not possible here because the Hampden Board of Selectmen has indicated its unwillingness

to do so.) In each of these prior cases, however, the municipal employee sought to be compensated in connection with a matter in which the *regional entity* was a party or had a direct and substantial interest. Specifically, in *EC-COI-92-27*, we considered whether a member of a three-town regional high school committee would have a conflict of interest if a private company, in which he was a 50% owner, had a contract with the committee to provide goods and services to the regional high school. We concluded that §20, which prohibits a municipal employee from having a financial interest, directly or indirectly, “in a contract made by a municipal agency of the same city or town”, prohibited the employee’s interest in such a contract, unless an exemption applied. We observed that an exemption would only be available if the employee could be designated a special municipal employee, and that the board of selectmen of each such town would have to grant the special employee designation.

Similarly, in *EC-COI-92-40*, we considered whether Commissioners of the Martha’s Vineyard Land Bank Commission, which is composed of a member from each of the towns of Martha’s Vineyard and the state Secretary of Environmental Affairs or her designee, could act as real estate brokers in land transactions in which the Land Bank was seeking to purchase or sell property. We also addressed the same question with regard to members of town advisory boards, which, by statute, assist the Land Bank Commission in administering the Land Bank, and which are composed of a representative appointed by the local conservation commission, planning board, board of assessors, board of health, park and recreation committee, board of selectmen and water commission. We concluded that, under §17, a Land Bank Commissioner, whether or not designated as a special municipal employee, would be prohibited from acting as a broker for a private party in such a transaction. Further, where the broker is compensated for services rendered on behalf of the Land Bank, we concluded that receipt of such compensation is prohibited by §20 unless an exemption applied. Noting that “each municipality would ... be an interested party to the transaction as the Land Bank is an instrumentality of each of its member[] [towns],” we concluded that Land Bank Commissioners would have to seek special employee designation and the §20(d) exemption from the boards of selectmen of all of the member towns, and file a disclosure with the Town Clerk in all of the member towns.

We believe the facts you present are distinguishable from 92-27 and 92-40 in that you seek to represent private parties before Wilbraham boards and agencies other than the Committee. In analyzing your situation, we note that the restrictions of §17 apply to particular matters in which the “*same city or town*” by which the municipal employee is employed is a party or has a direct and substantial interest. Thus, by its express terms, §17 ought to apply to a Hampden employee *only* with regard to matters in which Hampden is a party or has a direct and substantial interest, and we can discern no legitimate policy in c. 268A for ruling otherwise. See *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977) (the language used is the principal source of insight into legislative purpose). However, such will rarely, if ever, be the case where the matter is one pending before a Wilbraham board or agency. Accordingly, we find that a member of a regional school committee (or similar regional body), who has been designated as a special municipal employee in that position by a member city or town, may represent private parties before other municipal boards and agencies of that same city or town (to the extent permitted by §17 as it relates to special employees), as long as neither the regional entity nor any other member municipality is a party to that matter or has a direct and substantial interest in it. If (but only if) such other member city or town is also a party or has a direct and substantial interest in the matter, then the member or employee of the regional body must also receive special municipal employee status in that *other* town to have §17 apply less restrictively to him.<sup>4/</sup> See *EC-COI-92-27*; *92-40*.

**DATE AUTHORIZED:** September 13, 1994

\* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup> “Compensation”, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

<sup>2/</sup> “Particular matter”, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>3/</sup> A member of a board or committee has official responsibility for matters which are pending in the board or committee “whether or not they have actually worked on the matter and whether or not they actually sat on the Board [or Committee] on a given day.” *EC-COI-92-36* (Board member); *93-24*; *89-7* (matters pending in an agency or Commission).

<sup>4/</sup> However, we point out that even if you are designated as a special municipal employee by both of the member towns, §17 would prohibit you from representing a private party before the Committee, because such a matter would be within your official responsibility as a Committee member. See, *EC-COI-92-40 n. 6*; see also *EC-COI-92-36*.